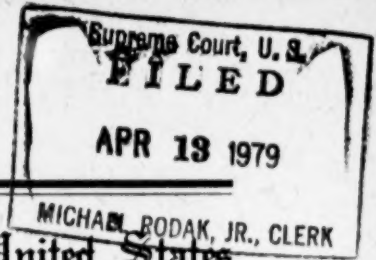


No. 78-1222



In the Supreme Court of the United States

OCTOBER TERM, 1978

WESTERN COMMUNICATIONS, INC., PETITIONER

v.

**FEDERAL COMMUNICATIONS COMMISSION AND
LAS VEGAS VALLEY BROADCASTING CO.**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE FEDERAL COMMUNICATIONS
COMMISSION IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is not yet reported. The decision of the Federal Communications Commission (Pet. App. 17a-54a) is reported at 59 F.C.C. 2d 1441. The opinion and order of the Federal Communications Commission denying a petition for rehearing (Pet. App. 55a-61a) is reported at 61 F.C.C. 2d 974. The decision of the Commission's administrative law judge (Pet. App. 62a-142a) is reported at 59 F.C.C. 2d 1463.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1978. Petitions for rehearing and rehearing en banc were denied on December 29, 1978 (Pet. App. 157a,

158a). The petition for writ of certiorari was filed on February 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission properly denied the renewal of petitioner's broadcast license because petitioner had violated the Commission's rules governing fraudulent billing practices and because petitioner had made misrepresentations to the Commission.

STATEMENT

Petitioner Western Communications, Inc., the licensee of KORK-TV in Las Vegas, Nevada, sought renewal of its license in 1972. Because the Commission had questions regarding petitioner's qualifications, an adjudicatory hearing was ordered on its renewal application. The purpose of the hearing was to determine whether petitioner had engaged in fraudulent billing, in violation of Commission rules,¹ and whether it had made misrepresentations in responding to the Commission's inquiries about its billing practices (Pet. App. 63a).

¹KORK-TV is an NBC affiliate. Its affiliation contract prohibited the deletion of any part of the network transmission without prior written authorization from NBC (Pet. 4; Pet. App. 66a-67a). KORK's compensation for carrying sponsored network programs is based on the number of network-originated commercial minutes it broadcasts.

To collect payment, KORK was required to submit a weekly Television Station Report, on a form provided by NBC, showing the NBC programs and commercials carried and indicating any departure from the total material transmitted by the network. With minor exceptions, KORK's contract required that it broadcast each program accepted, along with network commercials, logos, and promotional advertisements, without deletion (Pet. App. 67a). Each Station Report contained an affidavit signed by a station official certifying that there had been no deletions of network transmission except where indicated. KORK does not deny that at least some of those reports were inaccurate and that it overbilled NBC.

At the time petitioner's license came up for renewal, respondent Las Vegas Valley Broadcasting Company ("Valley") sought a construction permit to build and operate a new station. Valley's and petitioner's mutually exclusive applications were set for a comparative hearing to determine which would best serve the public interest (Pet. App. 2a, n.1). Specific questions were also raised regarding Valley's financial qualifications (Pet. App. 65a).

The administrative law judge concluded that petitioner had repeatedly violated the Commission's rules prohibiting fraudulent billing² and that it had misrepresented or misled the Commission about its practices (Pet. App. 67a-70a, 73a-83a).³ On those grounds, the administrative law judge concluded that petitioner was unqualified for renewal. The judge also concluded that Valley's application should be denied because it had failed to prove that it was financially qualified to construct and operate its proposed station (Pet. App. 141a).⁴ Because the administrative law judge found neither applicant qualified to hold a license, he reached no conclusions as to their comparative qualifications (Pet. App. 135a-142a).

²The administrative law judge concluded that the "clipping" or deletion of network transmissions, including commercials, was a regular and frequent practice at KORK and a considered, deliberate, and integral part of petitioner's operation of the station. Petitioner followed this practice, the administrative law judge found, in order to insert additional local commercials (Pet. App. 68a-71a). He found that these deletions were generally not reported to NBC (Pet. App. 67a), and that the practices that resulted in petitioner's fraudulent billing were directed by two successive general managers of the station whose superiors were chargeable with knowledge of the practice (Pet. App. 67a-72a).

³The Commission made four separate inquiries to petitioner about its billing practices. The administrative law judge found that petitioner's responses were either false or designed to mislead the Commission as to petitioner's actual billing practices (Pet. App. 82a).

⁴The challenge of Valley's financial qualifications grew out of questions regarding its ability to finance access to its proposed

The Commission affirmed the administrative law judge's findings with respect to petitioner's fraudulent billing practices and misrepresentations to the Commission (Pet. App. 17a). It concluded that the evidence established that KORK-TV was "off network" for significantly longer periods than authorized, that as a general practice it "clipped" all or parts of network commercials in order to telecast local advertising, and that it billed NBC for commercials that were not carried (Pet. App. 21a). In addition, the Commission found that viewer complaints and Commission correspondence should have alerted the station managers' superiors to the possibility of wrongdoing (Pet. App. 25a; see also Pet. App. 33a-34a). Noting that under Commission rules a violation can occur "when a licensee knowingly issues bills predicated on false information * * * or is so derelict in the management of its station's affairs as to permit fraudulent billing" (Pet. App. 23a), the Commission held that the record plainly established that the station's managers, who were also officers and directors of petitioner, knew or should have known that the reports they were certifying and submitting to NBC were patently false (Pet. App. 22a-23a).

The Commission also found ample support for the judge's findings that petitioner had not responded candidly to Commission inquiries about billing practices at the station and that it had made a number of substantial and material misrepresentations "clearly designed to conceal its operating practices * * *" (Pet. App. 26a-32a). As a result of the fraudulent billing, lack of candor, and misrepresentations, the Commission concluded that petitioner was not qualified to have its license renewed (Pet. App. 45a). The Commission also affirmed

transmitter site (Pet. App. 95a-98a, 139a-140a) and the availability of a bank loan that formed the basis for its financial proposal (Pet. App. 88a-93a, 137a-138a, 140a-141a).

the administrative law judge's conclusion that Valley had failed to prove that it was financially qualified and that its application should therefore be denied (Pet. App. 37a-40a).

The court of appeals affirmed the Commission's decision with respect to petitioner. It held that there was substantial evidence supporting the Commission's conclusions regarding petitioner's fraudulent billing practices and misrepresentations. The court rejected petitioner's claim that it lacked notice of the Commission's policy with regard to such billing practices, pointing out that the Commission has repeatedly articulated its strong objections to fraudulent billing since 1962 (Pet. App. 7a).⁵ The court also rejected petitioner's contention that denial of license renewal was an unduly severe sanction. It noted that the Commission has held, and the courts have affirmed, that misrepresentation is a valid ground for nonrenewal of a license. Moreover, the court concluded that the Commission's action fell well within the broad discretion accorded agencies in fashioning remedies to enforce compliance with agency policy (Pet. App. 7a-8a).

The court of appeals reversed the Commission's decision as to Valley, holding that there was insufficient support for the Commission's finding that Valley was not financially qualified. The court remanded the case to the Commission for reconsideration of Valley's present financial qualifications in view of the passage of time since its original application (Pet. App. 15a).

ARGUMENT

The decision of the court of appeals with respect to petitioner is correct. In any event, the cases involves no issue that merits further review.

⁵The court found that "[e]ven without specific Commission prohibition of clipping, the practice would appear manifestly

1. The Commission's decision that petitioner had engaged in fraudulent billing and misrepresentation that disqualified it from renewing its license is plainly supported by substantial evidence. Petitioner does not seriously contend otherwise. Instead, it contends that the Commission should be permitted to deny renewal of a license only on "clear and convincing" evidence that the licensee does not possess the necessary qualifications (Pet. 11).

This case involves the Commission's denial of an application for renewal of a broadcast license. There is no support in the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, or in any case for the proposition that denial of renewal of a broadcast license requires proof of a rule violation by clear and convincing evidence. Denial of a license renewal application is not a penal measure. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). Nor is it a deprivation of property, because a licensee's right to broadcast terminates when his license expires. 47 U.S.C. 301; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).⁶ When a license expires, the applicant for renewal has the burden of demonstrating that the public interest, convenience, and necessity would be served by granting it a license to operate for an additional period. 47 U.S.C. 309(e).⁷

fraudulent. But in this situation, KORK's contract with the network, the Commission's 1970 statement, and the Commission's rule all clearly barred clipping" (Pet. App. 7a).

⁶ "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; * * * a broadcast license is a public trust subject to termination for breach of duty." *Office of Communication of the United Church of Christ v. FCC*, 359 F. 2d 994, 1003 (D.C. Cir. 1966).

⁷ Petitioner's reliance on a broadcast licensee's "legitimate renewal expectancies" (Pet. 15) as a demonstration of why a stricter standard of proof should apply in renewal application proceedings begs the question because, as this Court had held, any such renewal

In view of the nature of a renewal proceeding, the application of a "clear and convincing evidence" standard would be inappropriate and contrary to governing statutes.⁸ The cases relied on by petitioner (Pet. 11-13) have adopted such a standard only in circumstances in which the government had initiated a proceeding to deprive an individual of valuable and protected liberty or property interests.⁹

expectations derive from "meritorious service," which the applicant must satisfactorily demonstrate to the Commission. *FCC v. National Citizens Commission for Broadcasting*, 436 U.S. 775, 782 n.5 (1978).

⁸ The traditional standard of proof in an administrative proceeding is the "preponderance of [the] evidence" standard. See 9 J. Wigmore, *Evidence* §2498 (3d ed. 1940); *McCormick on Evidence* §§339, 355 (2d ed. E. Cleary 1972); *Collins Securities Corp. v. SEC*, 562 F. 2d 820, 823 (D.C. Cir. 1977). The Commission has stated that "preponderance of the evidence" is the standard it applies in broadcast license proceedings. *Sea Island Broadcasting Corp.*, 44 Rad. Reg. 2d (P&F) 1265 (1978), appeal filed *sub nom. Sea Island Broadcasting Corp. v. FCC*, No. 76-1735 (D.C. Cir. Aug. 12, 1976).

The legislative history of the Administrative Procedure Act indicates that Congress contemplated that the traditional "preponderance of the evidence" standard would be the standard of proof to be applied in administrative proceedings generally:

[W]here a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance.

H.R. Rep. No. 1980, 79th Cong., 2d Sess. 37 (1946), reprinted in S. Doc. No. 248, *Administrative Procedure Act—Legislative History*, 79th Cong., 2d Sess. 271 (1946).

⁹ Both *Collins Securities Corp. v. SEC*, *supra*, and *Nassar and Co. v. SEC*, 566 F. 2d 790 (D.C. Cir. 1977), upon which petitioner primarily relies, involved revocation of SEC registrations and expulsion from the National Association of Securities Dealers, Inc. Unlike broadcast licensees, the investment brokers in *Collins* and *Nassar* had not been granted the exclusive right to use a valuable public resource for a limited period. Moreover, the Communications Act makes clear that broadcast licensees have no rights beyond the

2. The court of appeals correctly held that "courts ordinarily accord the Commission particular discretion in fashioning remedies to maximize compliance with Commission policy" (Pet. App. 8a). See *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-228 (1946); *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186-189 (1973). Neither the opinion of the court of appeals nor the decision of the Commission in this case reflects what petitioner characterizes as a "new 'standard of no standard,' " (Pet. 23), in which the agency has "unbridled discretion in dealing with its licensees" (*ibid.*). The Commission's decision makes clear that it carefully considered its action in denying petitioner's license renewal application in light of action it had taken in other cases involving similar types of misconduct and, where differences existed, it explained the basis for its different conclusions. See Pet. App. 23a-26a, 32a-34a.¹⁰ The basis

three-year term of the license and no property interests in the license. Similarly, in *Woodby v. INS*, 385 U.S. 276 (1966), the Court held that the "drastic deprivations that may follow" when a resident of this country is deported are so severe as to require a higher standard of proof than the preponderance standard. *Id.* at 285. That standard does not apply in every case in which a party claims a subjective expectation of enjoying a prerogative conferred by the government.

¹⁰Cases decided by the Commission subsequent to its denial of petitioner's renewal application, upon which petitioner relies to demonstrate a continuing pattern of arbitrary action by the Commission (Pet. 19-20), are, on their face, readily distinguishable. In *Microband Corp.*, 44 Rad. Reg. 2d (P&F) 1490, 1494 (1978), which involved an application for common carrier facilities, the Commission pointed out that the misconduct of a principal owner of the applicant had been unrelated to any FCC-licensed activities and the inaccurate statements made in filing documents with the Commission had been the result of negligence rather than an intention to mislead or conceal facts from the Commission. The instant case involved the use of FCC-licensed broadcast facilities for fraudulent purposes and the making of misrepresentations to the Commission that were "clearly designed to conceal its operating practices * * *" (Pet. App. 31a). *CBS, Inc.*, 69 F.C.C. 2d 1082 (1978), involved misconduct by a television network and network personnel that was not directly related to any individual station owned by the

for the Commission's decision in this case was thoroughly articulated, and the determination to deny the license renewal application was well within its discretion.¹¹

network. Moreover, the incident was an isolated one involving the presentation of four professional tennis matches (see *CBS, Inc.*, 67 F.C.C. 2d 969 (1978)), and it did not result from a deliberate policy adopted by the licensee and integral to its operations, as was the case with petitioner. *Tupelo Broadcasting Co.*, 67 F.C.C. 2d 1358, 1366-1368 (1978), similarly involved isolated misconduct that did not result from a deliberate policy adopted by the licensee. Moreover, there was no question of misrepresentation to the Commission in the *Tupelo* case. In *Empire Broadcasting Corp.*, 63 F.C.C. 2d 634 (1977), the Commission found no facts to implicate principals or corporate officers in the misconduct and, as in *Tupelo*, there was no finding of misrepresentation to the Commission. In the *CBS, Tupelo* and *Empire* cases, the Commission granted short-term license renewals, which reflects that the Commission drew a rational distinction between the misconduct in those cases and the substantially more significant misconduct in petitioner's case.

In contemporaneous and subsequent cases involving serious licensee misconduct similar to petitioner's, the FCC has treated the applicants just as it treated petitioner, by denying their license renewal applications. See, e.g., *Eastminster Broadcasting Corp.*, 58 F.C.C. 2d 24 (1976), *aff'd sub nom. Eastminster Broadcasting Corp. v. FCC*, 559 F. 2d 187 (D.C. Cir. 1977); *White Mountain Broadcasting Co.*, 60 F.C.C. 2d 342, reconsideration denied, 61 F.C.C. 2d 472 (1976), *aff'd White Mountain Broadcasting Co. v. FCC*, No. 76-2009 (D.C. Cir. Apr. 9, 1979); *Monroe Broadcasters, Inc.*, 60 F.C.C. 2d 692, reconsideration denied, 61 F.C.C. 2d 716 (1976); *WLLE, Inc.*, 65 F.C.C. 2d 774 (1977), *aff'd sub nom. WLLE, Inc. v. FCC*, No. 77-1787 (D.C. Cir. Jan. 23, 1979); *Berlin Communications, Inc.*, 68 F.C.C. 2d 923 (1978), reconsideration denied, F.C.C. 78-703 (Oct. 4, 1978), appeal filed *sub nom. Berlin Communications, Inc. v. FCC*, No. 78-2048 (D.C. Cir. Oct. 25, 1978).

¹¹Petitioner improperly relies on *Arthur Lipper Corp. v. SEC*, 547 F. 2d 171 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978), to demonstrate a conflict between the Second Circuit and the District of Columbia Circuit. As we have shown above, Congress has adopted substantially different regulatory schemes for SEC regulation of investment brokers and FCC regulation of broadcast stations. Moreover, the *Lipper* decision holds that an agency's discretionary choice of sanctions is subject to review for abuse of discretion and that under the special circumstances of that case, the SEC had abused

3. Petitioner's contention (Pet. 28-33) that a premature "leak" to the press of the Commission's decision to deny renewal of the license destroyed the integrity of the administrative proceeding is without merit. The "leak" occurred only after a lengthy evidentiary hearing, after the decision of the administrative law judge denying the renewal of the license destroyed the integrity of the representation grounds, after briefs on appeal had been filed with the Commission, after oral argument had been presented to the Commission, and after the Commission had instructed its staff to prepare an opinion denying the renewal of petitioner's license (Pet. App. 144a). The Commission noted that petitioner had failed to show how it had been prejudiced by the "leak" (Pet. App. 145a) and concluded (Pet. App. 146a) that

unauthorized publicity cannot be the basis, without more, for upsetting a decision regularly arrived at, following procedures substantively and procedurally adequate to determine the facts and the law relevant to the resolution of the case.

The court of appeals agreed and stated that although premature revelation of a decision is unfortunate, it could not identify any infringement of due process resulting from the disclosure in this case (Pet. App. 6a).

Petitioner's general exposition of the possible adverse effects of premature disclosure (Pet. 28-33) provides, at most, a basis to conclude that pre-decisional secrecy is a preferable policy for a decisionmaking body to adopt. Petitioner fails, however, to demonstrate that any disclosure prior to publication of the final agency decision—whether deliberate or unintentional—so impairs

its discretion. See 547 F. 2d at 183-185. That holding is in no respect inconsistent with the decision of the District of Columbia Circuit in this case that "courts ordinarily accord the Commission particular discretion in fashioning remedies to maximize compliance with Commission policy" (Pet. App. 8a).

the integrity of the proceeding as to require reversal. The case law, moreover, is contrary to petitioner's position, particularly in light of its failure to show more specifically how the "leak" here caused it to be injured.¹²

4. Finally, petitioner contends (Pet. 33-37) that the court of appeals erred in overturning the Commission's conclusions with respect to Valley's financial qualifications. Although we believe the court's decision was in error in this respect, the ruling on this issue does not raise any question of law of sufficient importance to call for this Court's review. The court of appeals simply found insufficient evidence in the record to support the Commission's findings that Valley's financial qualifications were adequate under the governing legal standard. That finding does not significantly affect petitioner's rights, and it will not have a significant effect on the administration of the Communications Act.

¹²*Eastern Air Lines, Inc. v. CAB*, 271 F. 2d 752, 757-758 (2d Cir. 1959), cert. denied, 362 U.S. 970 (1960), held that release of a press notice announcing the Board's tentative decision, followed six months later by the actual decision, did not reflect an improper prejudgment nor prejudice the right to a fair hearing. See *FTC v. Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308, 1323 (D.C. Cir. 1968) (Robinson, J., concurring) (footnotes omitted): "While occasionally, on particular facts, a predecisional release has been criticized for the outside appearance it created, no case seems to reflect the view that the practice works a deprivation of due process, and the few cases addressing the question have held that it does not." See also *N. Sims Organ & Co. v. SEC*, 293 F. 2d 78, 81 (2d Cir. 1961), cert. denied, 368 U.S. 968 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979